



INTERIOR BOARD OF INDIAN APPEALS

Ramona Button and Harlan Bohnnee v. Acting Phoenix Area Director,
Bureau of Indian Affairs

21 IBIA 57 (11/13/1991)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

RAMONA BUTTON AND HARLAN BOHNEE

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-58-A

Decided November 13, 1991

Appeal from cancellation of 41 farm leases on the Gila River Indian Reservation.

Affirmed in part; vacated and remanded in part.

1. Indians: Leases and Permits: Amendments

A change in the date on which annual rental payments are due under a lease of Indian trust land is a modification of the lease.

2. Indians: Leases and Permits: Generally--Indians: Trust Responsibility

Where the lessors under a lease of Indian trust land have authorized a Bureau of Indian Affairs Superintendent to take certain actions on their behalf, the Superintendent's authority to act remains subject to limitations imposed by the trust responsibility.

APPEARANCES: Glenn M. Feldman, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Ramona Button and Harlan Bohnee appeal from a February 7, 1991, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the cancellation of 41 farm leases on the Gila River Indian Reservation. For the reasons discussed below, the Board affirms the Area Director's decision in part, vacates it in part, and remands this matter to the Area Director for further action as discussed herein.

Background

Appellants are members of the Gila River Indian Community who hold several farm leases on the reservation. 1/ Twenty-two of appellant Button's leases and 19 of appellant Bohnee's leases are at issue in this appeal. 2/ The 41 leases cover a total of approximately 3,000 acres, consisting almost entirely of allotted land.

Under appellants' leases, the annual rental payments are due on January 1 of each lease year, and interest is required to be paid when payments are not made by the due date. Apparently, it is customary for appellants, and perhaps other lessees on the reservation, to obtain commitments for financing during December of each year and to use these funds to make their January 1 rental payments.

By December 1989, it had become apparent that both the availability and cost of water for crop year 1990 were extremely uncertain. On December 15, 1989, the Superintendent, Pima Agency, BIA, issued a notice to reservation farmers, stating in part:

Dear Farmer:

As you are aware, the water apportionment for the 1989 [sic] year will be substantially less than the previous years and it appears there will not be enough SCIP [San Carlos Irrigation Project] water to irrigate all farms located within the San Carlos Indian Irrigation Project. Our Realty Office has had several meetings with cotton gins in the area and advised them of the situation. In most cases, they are willing to work with the farmers they finance.

In order that water will be available to all of our current farmers/lessees, we are advising that each farmer should closely examine their own situation and make a determination if there are leases or acreage you may wish to drop. If you are going

1/ Appellants' statement of reasons before the Area Director stated that, in 1990, each of them held 29 leases, in addition to one joint lease. Further references in this opinion to appellants' leases are only to the leases at issue in this appeal.

2/ These are: GR 3960-2000, GR 3980-90, GR 4115-91, GR 4160-93, GR 4169-93, GR 4209-90, GR 4220-93, GR 4613-92, GR 4635-2002, GR 4636-2002, GR 4736-98, GR 4740-99, GR 4744-90, GR 4764-97, GR 4803-90, GR 4804-90, GR 4820-90, GR 4852-91, GR 4908-92, GR 4913-92, GR 4932-93, GR 4956-2003 (Button); and GR 3810-90, GR 4170-90, GR 4434-92, GR 4530-92, GR 4585-96, GR 4589-97, GR 4590-93, GR 4646-94, GR 4673-90, GR 4676-90, GR 4681-90, GR 4749-96, GR 4871-91, GR 4872-91, GR 4873-92, GR 4874-90, GR 4880-91, GR 4938-92, GR 4944-93 (Bohnee).

There are no copies of lease Nos. GR 4209-90 (Button) and GR 4944-93 (Bohnee) in the administrative record.

to release any acres or leases, please inform our office before December 31, 1989. If it is your decision to decrease the acreage farmed and pay rent based on the water apportionment scale developed by Branch of Land Operations, then it will be your responsibility to inform the landowners of your decision. It is also your responsibility to obtain written consents from 100%, if possible, of the landowners accepting your decision. We will allow you until February 28, 1990 to provide our Realty office with signed consents from the landowners accepting rent at a reduced amount based on the apportionment scale. If within that time period we have not received the consents, full rental and penalty interest is due as stipulated by provision No. 4 of the lease contract.

In late April 1990, when appellants had not paid rentals on their leases, the Superintendent wrote to them, 3/ stating:

Our records indicate that you have not paid your annual lease rentals which were due on January 1, 1990. Our office allowed you until 03/31/90 to pay rent without accrued penalty interest. Interest assessed (See Provision No. 4 of your lease) will become due and payable from the date such rental becomes due and will run until said rental is paid.

This is to inform you that you are delinquent in payment of the following amounts, each with interest due, from the due date until payment is made, at the rate shown:

* * * * *

You are hereby given ten (10) days from the date of your receipt of this notice [to] either pay rentals as due or to show cause why your lease(s) should not be cancelled for violation as set out above.

Appellants made their rental payments on May 29, 1990. In a June 11, 1990, letter to the Superintendent, they contended that they should not be required to pay penalty interest because the water problem had made it difficult for them to obtain financing and because they had continued to make capital investments for purposes of land development, despite lack of financing. They requested therefore that their lease payments be accepted without penalty interest.

Appellants also met with the Superintendent on June 11 to discuss the matter. During the meeting, they modified their original request for waiver

3/ The letters were sent by certified mail but were undated. From notations on copies of the envelopes, it appears that delivery was first attempted to both on Apr. 27, 1990, and that Button received her letter on May 3, 1990, and Bohnie received his on May 14, 1990.

of interest. Their modified position is reflected in their June 12, 1990, letter to the Superintendent: "Request 1: Lease payment on existing leases be accepted without penalty interest. We modified our position to request that interest be waived from January 1 through March 31. We would be willing to pay from April 1 to the date lease payments were made on the existing leases."

By letters dated June 19, 1990, the Superintendent rejected appellants' request, stating:

You have requested we waive your penalty interest from January 1st to March 31, 1990 due to the water shortage and the cost of your improvements on a development lease. It is our position that all the farmers (lessees) within the San Carlos Irrigation Project were well aware of the water situation in sufficient time to adjust and plan their 1990 financing accordingly, most accomplished this without major problems. The fact that SCIP always makes their official water apportionments in January is widely known, therefore, any information we provided prior to that date was only our best guess estimate and was made only to provide assistance to the farmers. In addition, the construction of the CAP [Central Arizona Project] interconnect canal was begun in October 1989, thereby alerting all the farmers that CAP water would be available in 1990, even though the cost of the water was yet to be determined.

* * * * *

In summary, due to the aforementioned facts, we must deny your request to waive any of the interest penalty. All the farmers who made late rental payments paid their interest due. As all the farmers are in the same boat, it is in our opinion, it would be unfair to make an exception in your case.

* * * * *

Due to the water and financing problems, our office extended the lease payment period for all land rent until March 31, 1990. All lessees who paid their rentals after this date have paid the full assessed penalty interest for the period January 1, 1990 to payment date.

You are hereby given ten (10) days from the date of your receipt of this notice to either pay the assessed penalty interest as due or to show cause why your farm leases should not be cancelled for violation as set out above.

(Superintendent's June 19, 1990, letters at 2-3). Button was assessed interest in the amount of \$9,880.78. Bohnie was assessed interest in the amount of \$4,886.37.

Appellants did not respond to these letters and, on August 13, 1990, the Superintendent cancelled their leases effective upon harvesting of the 1990 cotton crop. Appellants appealed the cancellations to the Area Director, who affirmed them on February 7, 1991.

Appellants' appeal from the Area Director's decision was received by the Board on March 5, 1991. Only appellants filed a brief.

Discussion and Conclusions

In their appeal to the Area Director, appellants abandoned their "modified" position and challenged the penalty interest for the entire period January 1 - May 29, 1990. Before the Board, they continue to seek relief for the entire period. They argue that the Superintendent had the authority to waive interest and that she was arbitrary and unreasonable in declining to waive it in the circumstances present in the spring of 1990. At the very least, they contend, interest should have been waived for the period January 1 - March 31, 1990. Further, appellants argue, the Area Director improperly based his decision upon a conclusion that it would be unfair to relieve appellants of the obligation to pay penalty interest when other farmers on the reservation had paid it.

[1] Although no party has raised the issue, it is apparent that there is a threshold question here concerning the authority of the Superintendent to defer the rental payment date in appellants' leases without obtaining the consent of the landowners. As noted above, all the leases provide for payment of rental on January 1 of each year. A change in this date is a modification of the lease. 25 CFR 162.12(a) provides:

Except as provided in paragraphs (b), (c), and (d) of this section [not relevant here], a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

All but one of appellants' leases include a paragraph authorizing the Superintendent to take certain actions. The paragraph, as it appears in most of the leases, provides:

6. SUPERINTENDENT'S AUTHORITY TO PERFORM CERTAIN ACTS:

By executing this lease, the Lessor hereby authorizes the Superintendent to take such actions as being necessary and convenient to carry out the terms of this lease and to protect and safeguard his interests. This authority shall include but is not necessarily limited to the approving of leasehold and crop mortgages, subleasing, assigning and modifying or cancelling the lease and transferring existing cotton acreage and allotments off the land for the purpose of leasing, conserving, and/or protecting the land and the crops thereon. However, this authority does not

include the changing of the monetary rental rate nor extending the term of the lease without the consent of the Lessor.

As to the leases containing the paragraph as quoted, the Board finds the landowners consented in advance to the Superintendent's modification of their leases. Therefore, with respect to these leases, the Board concludes that the Superintendent had authority to defer the rental payment date without obtaining the consent of the landowners.

In several of the leases, however, the phrase "subleasing, assigning and modifying" has been crossed out. ^{4/} Arguably, even without these words, the paragraph might still be interpreted to authorize the Superintendent to modify the leases without obtaining the landowners' consent. However, given that the word "modifying" was originally in the paragraph and was explicitly crossed out, it seems apparent that the lessors under these leases did not intend to vest the Superintendent with power to modify the leases without their consent.

One lease, GR 3810-90 (Bohnee), does not contain the paragraph at all. ^{5/} The Board concludes that, as to this lease and the leases in which the phrase "subleasing, assigning and modifying" has been crossed out, the Superintendent lacked authority to defer the rental payment date without obtaining the consent of the landowners. As to these leases, the Board finds that appellant's leases were not modified and that appellant was, for this reason, liable for interest from January 1 until May 29, 1990, as provided in the leases.

With respect to the leases which the Superintendent had authority to modify, a question remains concerning the manner of modification. No formal lease modifications are included in the record. Apparently, the Superintendent intended to issue a blanket lease modification covering all leases on the reservation.

It is clear from the record that an emergency situation existed on the Gila River Reservation in December 1989, caused by the extreme uncertainty over the availability of water for the following year. Judging from the number of leases held by appellants, the Board assumes that the overall

^{4/} These are: GR 4736-98, GR 4740-99, GR 4744-90, GR 4803-90, GR 4804-90, GR 4820-90, GR 4852-91, GR 4908-92, GR 4913-92 (Button) and GR 4749-96 (Bohnee). In the record copy of one lease, GR 4764-97 (Button), the page which should include paragraph 6 is missing; as noted in footnote 2, lease Nos. GR 4209-90 (Button), and GR 4944-93 (Bohnee) are missing in their entirety. Therefore, it is not possible to determine whether the phrase has been crossed out in these leases.

^{5/} Paragraph 24 of this lease provides: "The Lessors hereby authorize the Superintendent to act on their behalf during the term of this lease in matters pertaining to Lessor consent to programs of the United States Department of Agriculture, State of Arizona and crop financing." This authorization clearly does not include authority to modify the lease by deferring the rental payment date.

number of leases on the reservation is quite high. It appears that, under the circumstances present in December 1989, it would not have been feasible to prepare a lease modification for each of the outstanding leases. Under these particular circumstances, the Board finds that a blanket modification was proper with respect to those leases which the Superintendent had authority to modify. 6/ The Board assumes that the December 15, 1989, "Dear Farmer" letter, quoted above, was intended to constitute such a modification. Although the letter does not specifically state that it was intended to modify reservation leases, it was apparently so understood. That letter, however, extended the rental payment date only until February 28, 1990. There is no written document in the record extending the date until March 31, 1990. 7/

Despite the lack of such a document in the record, the Board will assume, for purposes of this decision only, that there was a written blanket modification deferring the rental payment date from February 28 to March 31, 1990. 8/ The Board will therefore assume, again for purposes of this decision only, that this second modification was valid as to those leases which the Superintendent had authority to modify.

Appellants argue that the Superintendent had authority to waive interest otherwise due under appellant's leases. Appellants cite no source for this authority other than paragraph 6 of the leases, and the Board is not aware of any other source. The Board agrees that the Superintendent had authority to waive interest with respect to those leases which she was authorized to modify under paragraph 6 of the leases. However, for the same reasons discussed above, concerning authority to defer the rental payment date, the Board finds that the Superintendent lacked authority to waive interest for lease No. GR 3810-90 and the leases listed in footnote 4, supra.

Appellants next argue that they had done everything in their power to obtain financing and that, given the water situation on the reservation, the Superintendent was arbitrary and unreasonable in declining to waive interest on their leases. The Board disagrees.

Appellants were legally obligated to pay rental on January 1. Any relief they were afforded from this obligation was a favor to them and was, in fact, given at the expense of the landowners, who were legally entitled to receive their rental payments on January 1. The December 15, 1989, "Dear

6/ Even so, there are dangers in such an approach, as illustrated by the discussion above, when it is based upon an assumption that the Superintendent has identical authority with respect to all leases on the reservation.

7/ BIA's late April letters to appellants refer to an apparently previously granted extension: "Our office allowed you until 03/31/90 to pay rent without accrued penalty interest." See also June 19 letters.

8/ Given the Board's conclusions below, the absence of this document from the record is not critical. Under other circumstances, it might well be crucial.

Farmer" letter indicated that penalty interest would be charged. Accordingly, appellants cannot claim that they were led to believe interest would not be charged.

[2] Further, although the landowners had granted the Superintendent authority to modify their leases, the Superintendent's authority was still subject to limitations imposed by the trust responsibility. The Superintendent's trust duty in this case was to the Indian landowners, not to appellants, even though appellants are themselves Indian. Tsosie v. Navajo Area Director, 20 IBIA 108, 117 (1991); Smith v. Acting Billings Area Director, 18 IBIA 36, 39 (1989). This duty clearly required the Superintendent to consider the interests of the landowners in determining whether to waive interest for the lessees. As noted above, the landowners were entitled to timely rental payments; even in a time where special accommodations to the lessees were appropriate, the landowners were entitled, at the least, to relative certainty concerning when the payments would be made. In this case, as far as the record shows, appellants not only failed to make their payments by the deferred due date, but also failed to inform BIA of their inability to meet the deadline or of their expectations as to when they could make the payments. Rather, they apparently simply let the deadline pass and waited for BIA to contact them concerning payment. Rental payments were not made until almost 5 months after they were due. Thus, the landowners not only received their rental payments 5 months late but had no way of knowing, during that period, when they could expect the payments.

In essence, appellants are in the position of seeking a special accommodation, *i.e.*, waiver of interest, which other lessees in the same position as appellants have not been granted. ^{9/} Appellants contend that it is irrelevant to their appeal that other lessees were required to and did pay penalty interest. While this may be true as a procedural matter, the fairness of the Superintendent's decision in appellant's case is bolstered by the fact that she apparently treated all lessees in like circumstances alike.

Appellants have failed to show that the procedure under which they were assessed interest was unfair in itself or as it was applied to them. They have not shown that the Superintendent committed legal error or acted unreasonably in declining to waive interest. Within the limits imposed by law, including the trust responsibility, the Superintendent's authority to waive interest for appellants' leases was discretionary. *See, e.g., GMG Oil & Gas Corp. v. Muskogee Area Director*, 18 IBIA 187 (1990). The Board affirms the Area Director's decision insofar as that decision affirmed the denial of appellants' interest waiver request.

^{9/} Appellants contend that the Superintendent waived interest for those lessees who made their payments by Mar. 31. Assuming this was the case, the Superintendent did not act unreasonably in differentiating between those lessees who paid by Mar. 31 and those who failed to meet even that deferred deadline.

It appears, however, that the amount of interest specified in the Superintendent's June 19, 1990, letters may not have been calculated in accordance with the terms of the leases. The interest schedules attached to the letters indicate that interest was calculated at the rate of 13 percent. The leases, however, vary as to how interest is to be calculated.

Lease No. GR 3810-90 provides that interest for late payments is to be assessed at the rate of 12 percent. Six leases provide:

4. INTEREST:

It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest will be assessed based on the average prime rate in effect on the last day of each month, plus three (3) percent. Interest assessed pursuant to this provision will become due and payable from the date such rental becomes due and will run until said rental is paid.

Leases Nos. GR 4908-92, GR 4913-92, GR 4932-93, GR 4956-2003 (Button); GR 4880-91, GR 4938-92 (Bohnee).

The remainder of the leases 10/ provide:

4. INTEREST:

Rental unpaid after the due date shall bear interest at the highest rate allowable by law from the date it becomes due until paid, but this Provision shall not be construed to relieve Lessee from any default in making any rental payment at the time and in the manner herein specified. The rentals called for hereunder shall be paid without prior notice or demand.

The calculation for Lease No. GR 3810-90 is clearly incorrect. Further, while it is possible that the rates arrived at under the two formulas quoted above would be identical, it does not appear that BIA took the differences in the leases into consideration, and there is nothing in the record showing how BIA arrived at the 13-percent rate.

Therefore, this matter must be remanded to the Area Director for recalculation and/or explanation of the interest rate(s) for the various leases. The Area Director shall issue a new decision showing the recalculated rate(s) and explaining the basis for them.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 7,

10/ Except, possibly, for lease Nos. GR 4209-90 (Button) and GR 4944-93 (Bohnee). See note 2.

1991, decision is affirmed in part and vacated in part. This matter is remanded to him for further action in accordance with this opinion.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge